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NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1999

OLIVER & WRIGHT MOTORS, INC. et al.,
Petitioners,

v.

CITY OF HOOVER,
Respondent.

OLIVER & WRIGHT MOTORS, INC. et al.,
Petitioners,

v.

CITY OF ALBERTVILLE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

I.

Does the imposition of a tax by a local government on activities and persons outside its boundaries, for the sole purpose of generating revenue, constitute taking of property without due process of law, violating the due process guarantees of the Fourteenth Amendment of the United States Constitution?

We contend that it does.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent City of Albertville, et al.	Henry C. Chappell, Jr.
Counsel for Respondent City of Hoover	Roger L. Bates I. Ripon Britton, Jr. J. Ken Thompson
Counsel for Alabama Department of Revenue and Department Commissioner	Dan E. Schmaeling
Counsel for Alabama Department of Finance, Director of Finance, and State Comptroller	Jerry E. Carpenter
Counsel for City of Tuscaloosa	Timothy H. Nunnally
Counsel for Towns of Loxley, Notasulga, Samson, Faulkville, Weaver, Guntersville, Luverne, and Haleyville	C. Winston Sheehan, Jr.
Counsel for Town of Clayton	Alex L. Holtsford
Counsel for City of Tallassee and Town of Notasulga	John Smith
Counsel for Towns of McKenzie and Georgiana	P. Richard Hartley
Counsel for City of Geneva	John Knowles
Counsel for Town of Northport	Ronald L. Davis

Counsel for City of Thomasville	Edmon H. McKinley
Counsel for City of Tuscumbia	B.T. Gardner, Jr.
Mayor of Town of Dayton	William S. Poole, Jr.
Counsel for town of Loxley	L. Brian Chunn
Mayor of Town of St. Florian	Joe Lamprecht
Counsel for Town of Madison	William W. Sanderson, Jr.
Counsel for Town of Valley Head	Patrick H. Tate
Counsel for Town of Myrtlewood	William T. Coplin, Jr.
Counsel for City of Sumiton	Edward R. Jackson
Counsel for Town of Dutton	Tommy Armstrong
Counsel for City of Huntsville	Peter S. Joffrion
Counsel for City of New Hope	Douglas C. Martinson
Counsel for Towns of Hammondville and Sylvania	Terry G. Hutcheson
Counsel for City of Prattville	George E. Howell
Counsel for Town of Excel	Windell C. Owens

Counsel for City of Centreville	Richard M. Kemmer, Jr.
Counsel for Alabama League of Municipalities as Amicus Curiae	Robert C. Black Ken Smith
Petitioners' Counsel	William J. Baxley
Trial Judge	Hon. Charles Price Circuit Judge Montgomery County, Alabama, 15th Judicial Circuit
Respondents	City of Hoover, Alabama City of Albertville, Alabama and a class of similarly situated municipalities
Petitioners	Oliver & Wright Motors, Inc. and a class of similarly situated businesses
Supreme Court of Alabama	Hon. Perry O. Hooper, Sr. Hon. Hugh Maddox Hon. J. Gorman Houston Hon. Ralph D. Cook Hon. Harold See Hon. Champ Lyons, Jr. Hon. Jean Brown Hon. Douglas Inge Johnstone

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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STATEMENT OF GROUNDS OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254 because this Petition is from a decision of the Supreme Court of Alabama in a civil case.

(i) Date of the decision: March 26, 1999

(ii) No rehearing or extension of time has been sought or obtained

(iii) No cross petition has been filed

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 10.1(c) of the Rules of the Supreme Court

(v) Because 28 U.S.C. § 2403(b) may apply, a copy of this petition has been served on the Attorney General of the State of Alabama.

STATEMENT OF THE CASE

(I) Nature of the Case, Course of Proceedings and Disposition

This class action was instituted by Oliver & Wright Motors, Inc. ("Oliver & Wright") on January 2, 1992 in the Circuit Court of Montgomery County, Alabama. (C.R. 1-11). Petitioners filed an Amended Complaint on November 3, 1993. (C.R. 38). Petitioners contend that *Ala. Code* § 11-51-206 (1975), which authorizes municipalities to levy a privilege or license tax and a sales tax on businesses outside the city limits but within the police jurisdiction is an unconstitutional practice because it amounts to taxation for revenue generating purposes without representation and the taking of private property without due process of law. *Ala. Code* § 11-51-206 (1975), C.R. 1-11, 438-47.

Petitioners sought relief in the form of: 1) a judgment declaring *Ala. Code* § 11-51-206 (1975) to be unconstitutional; 2) an order refunding all taxes collected from Oliver & Wright and members of the class by the Alabama Department of Revenue, Defendant Albertville,

and individual members of the Defendant class; 3) an order declaring the final assessment against Petitioner Oliver & Wright to be null and void; 4) a permanent injunction prohibiting the Department of Revenue and members of the Defendant class from collecting the tax against businesses within the police jurisdictions; 5) an award of attorneys fees pursuant to equitable common fund principles to attorneys for Petitioners and the class certified by the court; and 6) an award of such other, further and different relief as the class may be entitled. (C.R. 46).

On November 3, 1993, Petitioners filed motions to certify a plaintiff and defendant class. (C.R. 31-37). These motions were granted by the trial court and on September 29, 1994 a plaintiff class defined as:

> All businesses within the State of Alabama which operate outside the corporate limits of municipalities but within the police jurisdictions thereof which are or have been charged a local sales tax pursuant to *Ala. Code* § 11-51-206 (1975).

was certified. The trial court also certified a defendant class defined as:

> All municipalities in the State of Alabama which have levied a tax against businesses operating outside their individual city limits but within their police jurisdictions pursuant to *Ala. Code* § 11-51-206 (1975).

(C.R. 177-180).

Following certification of plaintiff and defendant classes, notices were sent by Petitioners' counsel to approximately 292 municipalities. A portion of those municipalities were subsequently dismissed by stipulation. The total number of municipalities within the defendant class is approximately 279. (C.R. 193-4, 195-206).

In September of 1997 the trial court held oral arguments on plaintiffs' and defendants' Motions for Summary Judgment, defendants' Motion to Decertify Classes, defendants' Motion for Pre-trial Evidentiary Ruling, and other matters. Following those oral arguments, on October 3, 1997, Petitioners filed an Amended Complaint asserting that Oliver & Wright cannot be legally required to collect an unconstitutional tax, seeking to add Ed Wright (an individual) as an additional plaintiff, and seeking to certify an additional plaintiff class made up of individual consumers who have paid sales taxes enacted pursuant to *Ala. Code* § 11-51-206 (1975) on purchases made outside the corporate limits of cities within the State of Alabama but within the police jurisdiction of those cities. Petitioners also filed a Motion to Certify Plaintiff Class of individuals represented by Ed Wright on that same day. (C.R. 591-603).

On November 13, 1997 the trial court issued an order which became the subject of an interlocutory appeal to the Supreme Court of Alabama. That order, in pertinent part, reads as follows:

> 1. Defendant Albertville's Alternative Motion to Strike or Dismiss Plaintiff's Amended Complaint is granted without prejudice to the right of Plaintiff to refile the Amended Complaint and Motion to Certify Additional Plaintiff Class.
>
> 2. Defendant Albertville's Motion for Pre-trial Evidentiary Ruling is granted and further, it is found that Plaintiff does not have the burden to affirmatively prove, as an element of its constitutional attack upon "sales tax" statutes and ordinances with respect to Defendant Albertville and each of the other Municipalities, that there is not a reasonable relationship between the revenues from such sales taxes and/or from the combination of sales taxes and license taxes/fees from police jurisdictions and the costs

> necessary to provide services to the police jurisdiction.
>
> 3. Defendants' Motions to Decertify Classes are denied.
>
> 4. Defendants' Motions for Summary Judgment are denied.
>
> 5. Plaintiffs' Motion for Summary Judgment is denied.
>
> 6. Rulings on other motions and matters are deferred until any appeals concerning this ruling are resolved.

(C.R. 752-756).

On November 26, 1997, Respondent Albertville filed a Petition for Permission to Appeal and Petition for Writ of Mandamus in the Alabama Supreme Court. The City of Hoover also filed a Petition for Permission to Appeal. On February 3, 1998, the Alabama Supreme Court granted permission for both appeals on two issues:

> I. Whether municipalities can constitutionally exercise the powers delegated to them by the Alabama State Legislature contained in § 11-51-206, Code of Alabama (1975) which allows them to impose sales taxes on retail consumers for purchases from businesses located outside the corporate limits but within their respective police jurisdiction.
>
> II. Whether a business located outside the corporate limits of a municipality but within its police jurisdiction has standing to challenge the constitutionality of the sales tax imposed on retail consumers pursuant to § 11-51-206, Code of Alabama (1975).

On March 26, 1999 the Supreme Court of Alabama reversed the trial court and remanded with directions

finding that while Petitioners had standing, the statute at issue was constitutional.

(II) Statement of Facts with References to Record.

The facts upon which this suit turns are undisputed. Petitioner Oliver & Wright Motors, Inc. is a business located outside the city limits of Albertville but within its police jurisdiction. The City of Albertville assessed a sales tax which is collected by Alabama Department of Revenue. (C.R. 134).

The City of Albertville passed a sales tax ordinance which was based upon, and copied from, the Alabama sales tax statute. (Howren Deposition, page 16).[1] The City of Albertville had a license fee tax which also taxed businesses based on a percentage of gross receipts, but which was collected by the City of Albertville.

The Alabama Department of Revenue collected the sales tax for the City of Albertville and collects for other cities which request it to do so. (C.R. 58-107). The Alabama Department of Revenue collects or has collected local sales taxes in police jurisdictions for over 100 cities in the State of Alabama. (C.R. 69, 84-107).

The legislative history of *Ala. Code* §§ 11-51-200 through 11-51-206 (1975) makes it clear that the sales tax collected by the Alabama Department of Revenue for municipalities is solely a revenue generating tax. General Acts of Alabama 1969, No. 917 p. 1653 is the predecessor to the current *Ala. Code* § 11-51-200 (1975) and it serves as the legislative basis for *Ala. Code* §§ 11-51-200, 11-51-202, and 11-51-206 (1975). Act No. 917, which is set forth in the appendix, empowers all cities and towns to provide by ordinance for the levy of all sales taxes parallel to the

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[1]The Howren deposition is attached to the Clerk's Record.

levy of sales taxes by the state in *Ala. Code* §§ 40-23-1, 40-23-2, 40-23-4, 40-23-6 through 40-23-32, and 40-23-34 through 40-23-36 (1975). Act No. 917 and the code sections referred to therein were enacted pursuant to the Legislature's passage of Act No. 100, pg. 298, H. 94, Second Special Session 1959. The short title to that act, of which relevant portions are included in the appendix for the Court's convenience, reads **"[t]o raise revenue"** *Id.* (emphasis supplied). This short title unambiguously states the legislative intent and purpose of the statute at issue in this case, *Ala. Code* § 11-51-206 (1975).

Ala. Code § 11-51-91 (1975) enables municipalities to regulate the police jurisdiction and compensate itself for services provided to the police jurisdiction through a license fee. The full text of this statute appears in the appendix.

ARGUMENT

(I) Amplification of Reasons for Allowance of Writ

The imposition of a tax by a local government on activities and persons outside of its boundaries, solely to generate revenue, constitutes the taking of property without due process of law and violates the due process guarantees of the Fourteenth Amendment to the United States Constitution.

Ala. Code § 11-51-206 (1975) allows municipalities to impose sales taxes on purchases from businesses located outside the city limits but within the city's police jurisdiction. The sole purpose of the sales tax is to raise revenue for the local municipal government. As was concluded by the Alabama Supreme Court, "we are not presented with a statute that grants only regulatory or licensing authority but under which a municipality improperly attempts to raise general revenues." *City of Hoover v. Oliver & Wright*

Motors, Inc., Nos. 1970366, 1970368, 1999 WL 164225, at *3 (Ala. 1999). Having reached what appeared to be the first conclusion on a path to finding the tax is constitutionally impermissible, the Alabama Supreme Court bizarrely changed horses mid-stream and held that the tax bears a rational relationship to a legitimate interest of the state legislature. *Id.* at *5.

In *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), this Court enunciated the test for determining whether taxes constitute the taking of property without due process of law. The issue was whether an income tax levied against an out of state corporation doing business in Wisconsin on earnings derived from property located, and business transacted, in the state (assessed at the point dividends were paid out) offended the Fourteenth Amendment. *Id.* In reaching its conclusion that the Wisconsin tax did not offend the Fourteenth Amendment the Court explained:

> That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

311 U.S. at 444. Finding that J.C. Penney had enjoyed the substantial privilege of carrying on business in Wisconsin, this Court found that the tax was supported. *Id.* at 444-445.

Utilizing the same test in the instant case, the question becomes whether the taxing power exerted by the municipality bears fiscal relation to protection, opportunities and benefits given by the municipality. Petitioners contend that it does not. The Alabama statute challenged here allows a municipality to raise revenue from the po-

lice jurisdiction which lies outside its municipal borders and has no representation in the municipal government. There is no connection between this revenue producing tax and any service or privilege that the municipality provides within its police jurisdiction.

In its opinion, the Alabama Supreme Court adopted several reasons for concluding that the tax bears a rational relationship to a legitimate interest of the state legislature. Those reasons are:

> First, the legislature reasonably could have determined that if a municipality was not authorized to impose a sales tax in its police jurisdiction, local merchants might opt to conduct their businesses just outside the city limits, thus avoiding the burden of a sales tax while simultaneously enjoying most, if not all, of the benefits provided by the municipality within its city limits. Second, the legislature reasonably could have assumed that those businesses engaging in commercial activities within municipal police jurisdictions enjoy tangible and intangible benefits that result from those business' close proximity to the municipality, and that those benefits are comparable, and frequently identical, to those enjoyed by businesses operating within the corporate limits; and that this fact makes it appropriate for those businesses within the police jurisdiction to share directly in the burden of financing the expenses generally associated with providing those benefits. Third, the legislature reasonably could have concluded that authorizing a municipality to access an expanded sales-tax base would allow the per capita sales-tax burden to be shouldered more equitably by all those benefitting from municipal revenue. Fourth, the legislature reasonably could have assumed that without an expanded sales-tax base,

> a municipality would be more likely to annex adjoining areas for the sole purpose of raising additional revenue, rather than for the purpose of supporting the growth of its citizenry.

City of Hoover v. Oliver & Wright Motors, Inc., Nos. 1970366, 1970368, 1999 WL 164255, at *4 (Ala. 1999). Each reason ignores the legislature's enunciated purpose in enacting the police jurisdiction sales tax—to raise revenue. The Alabama Supreme Court also ignores its own conclusion to the same effect, *supra*. The reasons the Alabama Supreme Court finds to support the tax are reasons that a state may enact, and has enacted, taxes and fees pursuant to its police powers. However, this is not what the State Legislature has accomplished here. Here, the legislature has passed a statute which allows a municipality to raise revenue from transactions occurring beyond its borders involving individuals and businesses not represented in the municipal government, and not allowed to vote on imposition of the tax. The Alabama Supreme Court attempts to allay this travesty by stating that police jurisdiction residents had an opportunity to participate in the election of members of the state legislature body that adopted the challenged statute. This reasoning ignores the critical fact that the statute here is merely an enabling provision. It was the municipal governments, in which the police jurisdiction residents have no voice, that enacted the taxes here in issue.

Petitioner is aware of no case, prior to the Alabama Supreme Court's decision in this matter, in which it has been held that a governmental entity may tax activities outside of its borders that have no relationship to the entity, solely to generate revenue for that entity. Petitioners can conceive of no rational reason to grant such powers to a governmental entity when the inherent danger in such an authorization is so readily apparent.

In this case, the distinction between statutes allowing local governments to levy extraterritorial taxes in the exercise of their police powers and statutes which allow local governments to levy extraterritorial taxes to raise revenue is crucial. This issue was addressed by this Honorable Court in *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978). In that case this Court reviewed the relationship between municipalities and police jurisdictions established under Alabama law and the authority of a municipality to levy taxes under its police power outside the city limits, but within the police jurisdiction. After denying the voting rights issues, this Court asked whether "the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a legitimate state purpose." *Holt Civic Club, supra,* at 70. In addressing this point, Justice Rehnquist explained:

> The Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their "city limit" signs, particularly since today's police jurisdiction may be tomorrow's annexation of the city proper. Nor need the city's interests have been the only concern of the legislature when it enacted the police jurisdiction statutes . . . Unincorporated communities like Holt dot the rim of most major population centers in Alabama and elsewhere, and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection. Established cities are experienced in the delivery of such services, and the incremental costs of extending the city's responsibility in these areas to surrounding environs may be substantially less than the expense of establishing

> wholly new service organizations in each community.

Holt Civic Club, supra, at 74. Accordingly, a majority concluded it was not unreasonable for the Alabama Legislature to require police jurisdiction residents to pay for the services they receive from a city through license fees. *Id.* Additionally, this Court indicated that a limitation on the municipality's ability to tax its police jurisdiction residents was appropriate: "[t]he statutory limitation on license fees to half the amount exacted within the city assures that police jurisdiction residents will not be victimized by the city government." *Id.*

The present tax, authorized by *Ala. Code* § 11-51-206, is wholly unlike the tax approved by this Court in *Holt Civic Club.* This sales tax was enacted to allow municipalities to raise revenue rather than to provide municipalities with a mechanism to ensure that police jurisdiction residents shouldered the burden and expense of providing them services. Nothing limits a municipality in its use of this revenue; it may use it for whatever purpose it deems appropriate. As such, this tax goes too far; it victimizes the residents of the police jurisdiction.

In *Holt Civic Club, supra,* this Court cited David E. Hunt's University of Chicago Law Review comment entitled *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities,* 45 U. Chi. L. Rev. 151 (1977), for the statement that "35 States authorize their municipal subdivisions to exercise governmental powers beyond their corporate limits", and that "[a]lthough the extraterritorial municipal powers granted by these States vary widely, several States grant their cities more extensive or intrusive powers over bordering areas than those granted under the Alabama statutes." *Id.* at 72.

This article further explains:

> In all instances the power wielded by the elected officials derives from the police power of the state . . . In short, each of the types of delegated police power involves the exercise of governmental power over citizens who have no political influence over the exercise of that power.

45 U. Chi. L. Rev. 151, 157 (1977). Moreover, all of the judicial decisions which upheld due process challenges to extraterritorial regulation maintained one limitation:

> . . . courts drew a distinction between the extraterritorial imposition of license fees, which was permissible, and extraterritorial taxation, which was not.

45 U. Chi. L. Rev. 151, 159 (1977). Clearly, the sales tax at issue in this case is not levied pursuant to police powers. It is a revenue producing extraterritorial tax which cannot withstand this Court's scrutiny because it victimizes the residents of the police jurisdiction. As such, the levy of this tax constitutes the taking of property without due process of law and violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The Alabama Supreme Court has set a dangerous precedent by authorizing municipalities to generate revenue from transactions which have no connection with the municipality from persons and businesses which have no voice in the municipal government which makes that decision. This practice violates the United States Constitution and runs afoul of the opinions of this Honorable Court.

Wherefore, Petitioners request that their Petition be granted and that the decision of the Alabama Supreme Court be reversed.

Respectfully Submitted,

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1998-99

1970366

City of Hoover

v.

Oliver & Wright Motors, Inc.

1970368

City of Albertville et al.

v.

Oliver & Wright Motors, Inc.

Appeals from Montgomery Circuit Court
(CV-92-04)

LYONS, JUSTICE.

Oliver & Wright Motors, Inc., is a business located within the police jurisdiction of the City of Albertville, but outside the city limits. In January 1992, Oliver & Wright filed a class-action complaint challenging the constitutionality of § 11-51-206, Ala. Code 1975, which authorizes a municipality to levy a sales tax on consumers who make purchases from businesses located outside the municipality's corporate limits but within its police juris-

diction.[1] Oliver & Wright sought to represent other businesses similarly located ("the Businesses").

In November 1993, Oliver & Wright amended its complaint and moved the trial court to certify both a plaintiff class and a defendant class. The trial court certified a plaintiff class, defined as follows and named Oliver & Wright as class representative:

> "All businesses within the State of Alabama which operate outside the corporate limits of municipalities but within the police jurisdictions thereof which are or have been charged a local sales tax pursuant to Ala. Code § 11-51-206 (1975)."

The trial court certified a defendant class defined as follows:

> "All municipalities in the State of Alabama which have levied a tax against businesses operating outside their individual city limits but within their police jurisdictions pursuant to Ala. Code § 11-51-206 (1975)."

The defendant class consists of 279 municipalities. Also named as defendants are the Governor, the director of the Department of Finance, the state revenue commissioner, and the state comptroller.

The Businesses contend that § 11-51-206 is unconstitutional because, they say, the tax it authorizes is a revenue-generating tax and, as such, constitutes taxation without representation and the taking of private property without due process of law. The Businesses seek a judgment declaring the statute and the city ordinances based upon it

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[1]In its certificate of service, Oliver & Wright indicated that it had served a copy of its complaint on the attorney general, pursuant to § 6-6-227, Ala. Code 1975, and Rule 44, Ala. R. App. P. See *Ex parte Northport Health Serv., Inc.*, 682 So. 2d 52 (Ala. 1996).

unconstitutional, and they seek also the refund of all taxes collected from them, an injunction prohibiting the Department of Revenue from collecting the tax, and attorney fees.

The defendants filed motions requesting certain evidentiary rulings, decertification of the classes, and a summary judgment. The Businesses also moved for a summary judgment. In November 1997, the trial court ruled in the Businesses' favor as to the evidentiary questions, refused to decertify the classes, and denied all motions for summary judgment. Pursuant to Rule 5, Ala. R. App. P., the Cities of Albertville and Hoover filed petitions for permission to appeal. Albertville also petitioned, in the alternative, for a writ of mandamus directing the trial court to dismiss the complaint on the basis that Oliver & Wright lacks standing to challenge the statute, or, in the alternative, to decertify the classes.

This Court permitted the interlocutory appeal, allowing the parties to address the following issues:

> "(1) Whether a business located outside the corporate limits of a municipality but within its police jurisdiction has standing to challenge the constitutionality of the sales tax imposed on retail consumers pursuant to [§ 11-51-206, Ala. Code 1975].
>
> "(2) Whether municipalities can constitutionally exercise the power delegated to them by the Alabama State Legislature contained in [§ 11-51-206, Ala. Code 1975], which allows them to impose sales taxes on retail consumers for purchases from businesses located outside the corporate limits but within their respective police jurisdictions."

In addition to the Cities of Albertville and Hoover, other appellants in this case are the Cities of Tuscaloosa and Guntersville, and the Towns of Loxley, Notasulga,

Samson, Falkville, Weaver, Luverne, Haleyville, Clayton and Tallassee (all of these are sometimes collectively referred to as "the Municipalities").

I. STANDING

Sales taxes are imposed on consumers, not on retail businesses such as Oliver & Wright. *In re Fox*, 609 F.2d 178 (5th Cir.), *cert. denied, Alabama Dep't of Revenue v. Fox*, 449 U.S. 821 (1980); *Hill v. State*, 50 Ala. App. 587, 281 So. 2d 440 (Ala. Civ. App. 1973). The Municipalities argue that, as a merchant, Oliver & Wright has the role of collecting the sales tax and remitting it to the state; therefore, they argue, because Oliver & Wright did not pay the sales tax, it lacks standing to bring this action challenging the constitutionality of § 11-51-206. See, e.g., *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386 (1934). Oliver & Wright argues that it has standing to challenge the constitutionality of § 11-51-206 because it is charged with the duty of calculating, collecting, and remitting the sales tax to the Department of Revenue and because it is held solely responsible for any shortfalls. § 40-23-26(a), Ala. Code 1975.

In order to have standing, a plaintiff must have a real tangible legal interest in the subject matter of the lawsuit. *Eagerton v. Williams*, 433 So. 2d 436 (Ala. 1983). "'In Alabama, although retail sales tax is levied against the ultimate consumer, the burden is on the seller to collect from the purchaser the amount of tax due on a sale, and the State looks to the seller for the tax.'" *In re Peiffer*, 126 B.R. 364, 367 (Bankr. N.D. Ala. 1991) (quoting *Merriwether v. State*, 252 Ala. 590, 593, 42 So. 2d 465, 466 (1949)). We agree with Oliver & Wright that the imposition upon it of the burden to calculate, collect, and remit the tax under penalty of liability for any errors provides it with standing to challenge the constitutionality of the law that imposes that burden.

II. CONSTITUTIONALITY OF THE STATUTE

The legislature has authorized and empowered the state's municipalities to impose sales taxes outside their corporate limits, but within their police jurisdictions. Section 11-51-206, Ala. Code 1975, reads:

> "Levy of tax outside corporate limits.
>
> "The council or other governing body shall have the authority to levy and assess by ordinance within the police jurisdiction of any said city or town all taxes authorized by this article [including sales taxes]; provided, that said levy and assessment shall not exceed one-half the amount levied and assessed for like businesses, sales or uses conducted within the corporate limits, fees and penalties excluded."

Oliver & Wright contends that this Court has never held it constitutional for the legislature to authorize a municipality to levy a revenue-generating tax, as opposed to a regulatory tax, on entities outside its borders. According to Alabama law, Oliver & Wright argues, the legislature does not have the authority to allow a municipality to levy a revenue-generating tax on businesses that do not conduct their operations within the corporate limits of the municipality. Relying on *White v. City of Decatur*, 225 Ala. 646, 144 So. 873 (1932), Oliver & Wright insists that the levy of such a tax amounts to taxation without representation and the taking of property without due process of law. Furthermore, Oliver & Wright contends, citing *Hawkins v. City of Prichard*, 249 Ala. 234, 30 So. 2d 659 (1947), *overruled in part on other grounds, State Dep't of Revenue v. Reynolds Metals Co.*, 541 So. 2d 524 (Ala. 1988), municipalities are not authorized under the Constitution to levy a license tax on businesses located within their police jurisdiction but outside their city limits for the purpose of raising general revenue, either directly or indirectly.

In response, the Municipalities argue that the sales tax authorized by § 11-51-206 is constitutionally valid as an exercise of the plenary power of the State of Alabama that the legislature has properly delegated to municipalities. Before 1969, when § 11-51-206 was enacted, the imposition of any "sales tax" in a police jurisdiction was possible only under the licensing authority of § 11-51-91. In 1969, the legislature authorized municipalities to assess true sales and use taxes in their police jurisdictions. The state may delegate to municipal corporations the power to levy fees and taxes coextensive with the state. See *Al Means, Inc. v. City of Montgomery*, 268 Ala. 31, 104 So. 2d 816 (1958). The municipal taxing power so granted by the state can extend as far as the state, by express grant of authority, provides for it to extend. *Id.* If the state has the authority to directly levy a sales tax on consumer transactions occurring within a municipality's police jurisdiction, see § 40-23-1 et seq., it should follow that the state also has the authority to enable a municipality to levy a sales tax such as that authorized by § 11-51-206. Therefore, we are not presented with a statute that grants only regulatory or licensing authority but under which a municipality improperly attempts to raise general revenues. See, e.g., *Alabama Power Co. v. City of Carbon Hill*, 234 Ala. 489, 175 So. 289 (1937), *overruled in part on other grounds, State Dep't of Revenue v. Reynolds Metals Co.*, 541 So. 2d 524 (Ala. 1988); *Van Hook v. City of Selma*, 70 Ala. 361 (1881). Cf. *City of Mountain Brook v. Beaty*, 349 So. 2d 1097 (Ala. 1977).

We turn to Oliver & Wright's contention that statutes such as § 11-51-206 deny due process of law, contrary to the United States and Alabama Constitutions. This issue was before the United States Supreme Court in *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978), in the context of the Due Process and Equal Protection Clauses of the 5th and 14th Amendments to the United States Constitution.

There, the plaintiffs challenged the authority of Alabama municipalities to impose license fees on businesses located within the police jurisdiction without simultaneously extending the right to vote in municipal elections. The United States Supreme Court upheld Alabama's statutory scheme as a reasonable exercise of the state's authority to regulate municipalities and the areas just outside their corporate limits. The Supreme Court determined that the state legislature has a legitimate interest in seeing that the people in a police-jurisdiction area do not go without basic municipal services, and that it was not unreasonable for the Alabama legislature to require residents of a police jurisdiction to contribute through license fees to the expense of providing those services.

As the City of Hoover argued in it brief, it is clear that a municipality's authority conferred by § 11-51-206 to impose a sale tax within its police jurisdiction bears a rational relationship to a legitimate interest of the state legislature. We find persuasive the City of Hoover's argument that any of the following reasons would support a conclusion that the legislature, in authorizing the tax at issue here, was acting reasonably and responsibility. First, the legislature reasonably could have determined that if a municipality was not authorized to impose a sales tax in its police jurisdiction, local merchants might opt to conduct their businesses just outside the city limits, thus avoiding the burden of a sales tax while simultaneously enjoying most, if not all, of the benefits provided by the municipality within its city limits. Second, the legislature reasonably could have assumed that those businesses engaging in commercial activities within municipal police jurisdictions enjoy tangible and intangible benefits that result from those businesses' close proximity to the municipality, and that those benefits are comparable, and frequently identical, to those enjoyed by businesses oper-

ating within the corporate limits; and that this fact makes it appropriate for those businesses within the police jurisdiction to share directly in the burden of financing the expenses generally associated with providing those benefits. Third, the legislature reasonably could have concluded that authorizing a municipality to access an expanded sales-tax base would allow the per capita sales-tax burden to be shouldered more equitably by all those benefitting from municipal revenue. Fourth, the legislature reasonably could have assumed that without an expanded sales-tax base, a municipality would be more likely to annex adjoining areas solely for the purpose of raising additional revenue, rather than for the purpose of supporting the growth of its citizenry.

The Supreme Court also concluded in *Holt Civic Club* that the statutory limitation on license fees for businesses operating in a police-jurisdiction area to one-half the amount required of businesses operating in the city limits assured the police-jurisdiction residents that they would not be victimized by city government. Section 11-51-206 contains a similar statutory limitation on a sales tax imposed within a police jurisdiction, but outside the city limits, to one-half the amount required in the city limits.

Moreover, the Supreme Court determined in *Holt Civic Club* that the right to vote in elections of representatives to the state legislature protected the taxpayers from taxation without representation. Likewise, Oliver & Wright is not taxed without representation, because its principals are entitled, if they so choose, to participate in the elections of members of the legislative body that adopted the challenged statute.

The United States Supreme Court, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), while not specifically dealing with taxation within a police jurisdic-

tion, addressed the constitutionality of general-revenue taxation by a state:

> "This Court has indicated that States have considerable latitude in imposing general revenue taxes. The Court has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are 'unreasonable' or 'unduly burdensome.' Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:
>
> > "'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
> >
> > "'A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.'"

453 U.S. at 622-23 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-23 (1937)) (citations omitted).

While the United States Supreme Court's interpretation of the Due Process Clause in the 14th Amendment to the United States Constitution is not binding on this Court when this Court is interpreting the due process clause in the Alabama Constitution, that Court's reasoning can inform our judgment. *Pickett v. Matthews*, 238 Ala. 542, 192 so. 261 (1939). On the due-process issue presentee in this present case, we find the reasoning of the United States Supreme Court in *Holt Civic Club* and *Commonwealth Edison* persuasive. We therefore conclude that § 11-51-206 has not been shown to deny the due process guaranteed by the United States and Alabama Constitutions. To the extent that the dictum in *White v. City of Decatur*, endorsed by dictum in *City of Mountain Brook v. Beaty*, and relied on here by Oliver & Wright, indicates otherwise, it is hereby rejected.

III. CONCLUSION

The trial court's order denying the summary judgment motions filed by the Municipalities is reversed, and the cause is remanded with directions to enter a judgment in favor of the Municipalities. The City of Albertville's petition for a writ of mandamus is denied as moot.

1970366 — REVERSED AND REMANDED WITH DIRECTIONS.

1970368 — REVERSED AND REMANDED WITH DIRECTIONS; PETITION FOR WRIT OF MANDAMUS DENIED.

Hooper, C. J., and Maddox, Houston, Cook, See, and Brown,* JJ., concur.

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*Although Justice Brown was not a member of this Court when these cases were orally argued, she has listened to the tape of oral argument.

§ 11-51-206. Levy of tax outside corporate limits.

The council or other governing body shall have the authority to levy and assess by ordinance within the police jurisdiction of any said city or town all taxes authorized by this article; provided, that said levy and assessment shall not exceed one-half the amount levied and assessed for like businesses, sales or uses conduction within the corporate limits, fees and penalties excluded. (Acts 1969, No. 917, p. 1653, § 7.)

Act No. 917 H. 1307—McLain

AN ACT

Relating to all incorporated cities and towns within the State of Alabama; authorizing all cities and towns to provide by ordinance for the levy and assessment of sales taxes, parallel to the State levy of sales taxes as levied by Act No. 100, H. 94, Second Special Session 1959, as amended; providing that all such taxes levied or assessed shall be subject to all definitions, exceptions, exemptions, proceedings, requirements, provisions, penalties, fines, punishments, and deductions, as are provided by Act No. 100, H. 94, Second Special Session 1959, as amended; authorizing said cities and towns to provide by ordinance for the levy and assessment of an excise tax or use tax parallel to the State levy and assessment of excise or use taxes, as levied by Article 11, Chapter 20, Title 51, Code of Alabama 1940, as amended; providing that the levy and assessment of all said excise taxes and use taxes shall be subject to all definitions, exceptions, exemptions, requirements, provisions, penalties, fines, punishments and deductions, as are provided by Article 11, Chapter 20, Title 51, Code of Alabama 1940, as amended; providing that said cities and towns shall from time to time adopt by ordinance such rules and regulations for making returns and for ascertainment, assessment, and collection of any taxes levied as it may deem necessary to enforce these provisions; providing that the Council or other governing body may adopt in whole or in part any rules and regulations which may be promulgated by the State Department of Revenue or may modify and amend the same, subject to the discretion of the Council or other governing body; providing that the Council or other governing body shall have the authority to provide by ordinance for the rate of said tax, providing that the same may be levied and assessed in whole or

in part, in lieu of any privilege license tax based on gross receipts which at the time of said levy, is otherwise provided for by ordinance, pursuant to Title 37, Sec. 735, Code of Alabama 1940; providing that any previous pledge of the proceeds collected from a privilege license tax levied by ordinance, pursuant to Title 37, Sec. 735, Code of Alabama 1940, shall have full force and effect as to any levy or assessment made pursuant to this Act; providing for the levy and assessment of all taxes herein authorized within the police jurisdiction of any said city or town; providing that the Council or other governing body may by Resolution provide for the administrtion and collection of all taxes levied and assessed under the provisions of this Act by the State Department of Revenue under the provisions and procedures provided for by Act No. 203, H. 99, Special Session 1965.

Be It Enacted by the Legislature of Alabama:

Section 1. The Council or other governing body of all incorporated cities and towns within the State of Alabama is hereby authorized and empowered to provide by ordinance for the levy and assessment of sales taxes, parallel to the State levy of sales taxes, as levied by Act No. 100, H. 94, Second Special Session 1959, as amended, or as the same may hereafter be amended, except where inapplicable or where herein otherwise provided, and further provided that no city or town shall be authorized to levy any such tax against the Alcoholic Beverage Control Board of the State of Alabama in the sale of alcoholic beverages.

Section 2. All taxes levied or assessed by any city or town, pursuant to the provisions of Section 1 hereof, shall be subject to all definitions, exceptions, exemptions, proceedings, requirements, provisions, penalties,

fines, punishments, and deductions as are provided by Act No. 100, H. 94, Second Special Session 1959, as amended, or as the same may hereafter be amended, except where inapplicable or where herein otherwise provided.

Section 3. The Council or other governing body of all incorporated cities and towns within the State of Alabama is hereby authorized and empowered to provide by ordinance for the levy and assessment of an excise tax or use tax parallel to the state levy and assessment of excise or use taxes as levied by Article 11, Chapter 20, Title 51, Code of Alabama 1940, as amended, or as the same may hereafter be amended, except where inapplicable or where herein otherwise provided.

Section 4. All taxes levied or assessed by any city or town pursuant to provisions of Section 3 hereof shall be subject to all definitions, exceptions, exemptions, proceedings, requirements, provisions, penalties, fines, punishments, and deductions, as are provided by Article 11, Chapter 20, Title 51, Code of Alabama 1940, as amended, or as the same may hereafter be amended, except where inapplicable or where herein otherwise provided.

Section 5. The Council or other governing body making a levy or assessment of taxes under the provisions of this Act, shall from time to time adopt by ordinance such rules and regulations for making returns and for ascertainment, assessment and collection of any taxes levied as it may deem necessary to enforce its provisions, and upon request shall furnish any taxpayer with a copy of such rules and regulations. The Council or other governing body may adopt in whole or in part any rules and regulations which may be promulgated by the State Department of Revenue, or may modify and amend the same at the discretion of said Council or other governing body.

Section 6. The Council or other governing body levying or assessing taxes authorized by this Act shall have the authority to provide by ordinance for the rate of said tax. Said Council or other governing body may provide in any ordinances levying or assessing said tax that the same is levied and assessed in whole or in part, in lieu of any privilege license tax based on gross receipts which at the time of said levy is otherwise provided for by ordinance, pursuant to Title 37, Section 735, Code of Alabama 1940. In all cases where said levy and assessment made pursuant to this Act is required by ordinance, any previous pledge of the proceeds collected from a privilege license tax levied by ordinance pursuant to Title 37, Section 735, Code of Alabama 1940, shall have full force and effect as to any levy or assessment made pursuant to this Act.

Section 7. The Council or other governing body shall have the authority to levy and assess by ordinance within the police jurisdiction of any said city or town, all taxes authorized by this Act, provided that said levy and assessment shall not exceed 1/2 the amount levied and assessed for like businesses, sales, or uses, conducted within the corporate limits, fees and penalties excluded.

Section 8. The Council or other governing body may pass an ordinance or resolution requiring the State Department of Revenue to administer and collect any taxes levied and assessed under the provisions of this Act. In all cases where the Council or other governing body provides by ordinance or resolution for the administration and collection of any taxes levied under the provisions of this Act by the State Department of Revenue, said administration and collections shall be made under the same provisions and procedures provided for by Act No. 203, Special Session 1965.

Section 9. The provisions of this Act are severable. If any part of this Act is declared invalid or unconstitutional, such declaration shall not affect the part or parts which remain.

Section 10. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming law.

Approved September 12, 1969.

Time: 7:05 P.M.

Act No. 100

H. 94—Nichols, Meade, Boyd, Dodd, Roberts, Self, Cates, Johnson (Hardaway), Johnston (Leonard), Franklin

AN ACT

To raise revenue; levying a privilege or license tax against persons on account of certain business activities; prescribing the rate thereof and exemptions therefrom; superseding Article 10 of Chapter 20, Title 51, Code of Alabama 1940, as amended and supplemented.

Be It Enacted by the Legislature of Alabama:

. . .

Section 2. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows:

. . .

Approved August 18, 1959.
Time: 3:15 P.M.

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

OLIVER & WRIGHT MOTORS, INC., a corporation, individually and as representative of the Plaintiff's class.	*	
Plaintiff,	*	
vs.	*	CIV. NO. _____
CITY OF ALBERTVILLE; GUY HUNT in his official capacity as Governor of the State of Alabama; JAMES ROWELL in his official capacity as Acting Director of Finance for the State of Alabama; ROBERT CHILDREE, in his official capacity as Comptroller of the State of Alabama;	*	
Defendants.	*	

COMPLAINT

PARTIES

1. Plaintiff is a corporation organized and existing under the laws of the State of Alabama engaged in the business of selling used cars. Plaintiff's business is located outside the city limits of Albertville but within the police jurisdiction of Albertville.

2. Defendant City of Albertville is a municipality organized and existing pursuant to the laws of the State of Alabama.

3. Defendant Guy Hunt is named in his official capacity as Governor of the State of Alabama, and as such he is charged by law with the duty of taking care that all laws are faithfully executed; Defendant James Rowell is named in his official capacity as Acting Director of Finance for the State of Alabama, and as such he exercises authority over monies collected and distributed by the Department of Revenue of the State of Alabama; Defendant Robert Childree is named in his official capacity as Comptroller for the State of Alabama, and as such he exercises authority over monies distributed from the general fund of the State of Alabama.

PLAINTIFF CLASS ACTION AVERMENTS

4. This action is brought by plaintiff as a class action, on its own behalf and on behalf of all others similarly situated under provisions of Rule 23 of the Alabama Rules of Civil Procedure, for damages and injunctive relief.

5. The class represented by plaintiff operates businesses outside the corporate limits of Defendant Albertville but within the police jurisdiction of the Defendant Albertville and are charged a sales, use and/or excise tax by Albertville. The sales, use and/or excise taxes levied against members of the class was enacted by Albertville pursuant to Ala. Code § 11-51-206 (1975).

6. The exact number of members of the class is not presently known, but the class is so numerous that joinder of individual members is impracticable.

7. There are common questions of law and fact in this action that relate to or affect the rights of each member of the class — each member of the class was charged the taxes pursuant to a local ordinance which was enacted pursuant to the state statute, the constitutionality of which similarly affects the rights of each member of the

class — and the relief sought is common to the entire class as set out below.

8. The claims of plaintiff, which is a representative of the class described above, are typical of the claims of all members of the class.

9. The named plaintiff is the representative party for the class and is able to and will fairly and adequately protect the interests of the class.

10. Attorneys for plaintiff are experienced and capable in class action litigation and attacking the constitutionality of state laws and have successfully represented claimants in class action litigation attacking the constitutionality of state laws.

11. This action is properly maintained as a class action under Rule 23(b)(1) in that:

(a) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants;

(b) The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

12. Alternatively, this action is properly maintained as a class action under Rule 23(b)(2) in that the defendants have acted consistently in that they have acted pursuant to a state statute, and the actions of the defendants are applicable to the class as a whole, thereby making appropriate final injunctive relief with respect to the entire class as a whole;

ALLEGATIONS OF FACT

13. Ala. Code § 40-23-2 (1975) sets forth a tax levied on gross receipts tax (sales tax) for the State of Alabama. This tax is a revenue generating tax and not regulatory.

14. Ala. Code § 11-51-200 (1975), authorizes municipalities to provide for the levy of sales taxes, parallel to the levy of state sales taxes established by §§ 40-23-1, 40-23-2, 40-23-4, 40-23-6 through 40-23-32.

14. Ala. Code § 11-51-201 (1975), makes all such taxes levied by the municipalities subject to all definitions, exemptions penalties, fines, deductions, etc. provided in the state statues pertaining to sales taxes.

15. Ala. Code § 11-51-206 (1975), gives the municipalities the power to levy this sales tax within their respective police jurisdictions, provided said levy does not exceed 1/2 of the amount levied on businesses within the City.

16. Ala. Code § 11-51-207 (1975) allows municipalities to pass an ordinance requiring the State Department of Revenue to administer and collect the tax levied. The administration and collection by the state must be in accordance with sections §§ 11-51-180 through 11-51-185.

17. A certified copy of the ordinance is filed with the State Department of Revenue. The Department of Revenue then collects the tax, deducts a cost for collection, and pays the balance to the municipalities at the first of each month.

18. Ala. Code § 11-51-206, which authorizes municipalities to levy sales, use and excise taxes in police jurisdictions is unconstitutional because the tax is a revenue generating tax and therefore constitutes taxation without representation and the taking of property without due process of law.

19. Defendant Albertville passed an ordinance pursuant to Ala. Code § 11-51-206 which levies sales, use and excise taxes in its police jurisdiction. Defendant

Albertville further passed an ordinance pursuant to Ala. Code § 11-51-207 (1975) authorizing the State Department of Revenue to collect the tax.

20. Plaintiff moved from within the city limits of Defendant Albertville to within the police jurisdiction of the Defendant Albertville. After the move, the taxes Plaintiff was to pay became confused and the State Department of Revenue entered a final assessment for sales taxes not paid by the Plaintiff.

21. The local ordinance passed by Defendant Albertville is unconstitutional because the tax is a revenue generating tax and therefore constitutes taxation without representation and the taking of property without due process of law.

20. The collection of the tax by the State Department of Revenue and the retention of some of the funds collected — which are paid into the general fund — is unlawful because the tax is unconstitutional.

RELIEF SOUGHT

21. Based upon the foregoing allegations and averments, plaintiffs pray for the following relief by appropriate orders from this Honorable Court:

(a) an order pursuant to A.R.C.P. Rule 23(c)(1) certifying this action as a class action, with further orders as deemed necessary and proper by the Court under the premises as the Court deems necessary and proper;

(b) a judgment declaring §§ 11-51-206 *Code of Alabama,* (1975) to be unconstitutional;

(c) an order refunding all taxes collected from plaintiff and members of the class by the Alabama Department of Revenue and/or Defendant Albertville;

(d) an order declaring the final assessment against Plaintiff to be null and void;

(e) a permanent injunction prohibiting the Department of Revenue and Defendant Albertville from collecting the tax against businesses within the police jurisdiction of the City of Albertville;

(f) an award of attorneys fees pursuant to equitable common fund principles to attorneys for plaintiff and the class certified by the Court; and

(g) an award of such other, further and different relief as the class may be entitled.

NOTICE TO ATTORNEY GENERAL

Plaintiffs hereby certify they have sent a copy of this complaint, seeking to declare unconstitutional a statute of the State of Alabama to Honorable James Evans, Attorney General for the State of Alabama, by certified mail on the date this petition was filed.

/s/ William J. Baxley
WILLIAM J. BAXLEY

/s/ Charles A. Dauphin
CHARLES A. DAUPHIN
Baxley, Dillard & Dauphin
Attorneys for Plaintiffs
2000 16th Avenue South
Birmingham, Alabama 35205
(205) 939-0995

Plaintiffs' Address
Oliver & Wright Motors, Inc.
Route 2, Box 117
Albertville, AL 35950

Please serve Defendants at:

City of Albertville
c/o Mayor Arthur Baugh
201 South Broad
Albertville, AL 35940

Robert Childree
110 State House
11 South Union Street
Montgomery, AL 36130

Guy Hunt
217 State House
11 South Union Street
Montgomery, Alabama 36130

James Rowell
207 State House
11 South Union Street
Montgomery, Alabama 36130

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

OLIVER & WRIGHT MOTORS, INC., a corporation, individually and as representative of the Plaintiff's class.	*	
Plaintiff,	*	
	*	CIV. NO. CV
vs.	*	92-04-PR
CITY OF ALBERTVILLE; individually and as representative of the Defendant class JIM FOLSOM in his official capacity as Governor of the State of Alabama; JAMES WHITE in his official capacity as Director of Finance for the State of Alabama; ROBERT CHILDREE, in his official capacity as Comptroller of the State of Alabama; GEORGE E. MINGLEDORFF, III in his official capacity as Revenue Commissioner	*	
Defendants.	*	

AMENDED COMPLAINT

The Plaintiff amends his complaint by substituting Governor Jim Folsom in his official capacity for Guy Hunt and by seeking a defendant class comprised of all cities which have passed a local sales tax ordinance based

on § 11-51-206 Code of Alabama (1975). Plaintiff intends this Amended Complaint to supplant the original complaint and amendments thereto.

PARTIES

1. Plaintiff is a corporation organized and existing under the laws of the State of Alabama engaged in the business of selling used cars. Plaintiff's business is located outside the city limits of Albertville but within the police jurisdiction of Albertville.

2. Defendant City of Albertville is a municipality organized and existing pursuant to the laws of the State of Alabama which has passed and enforced a local sales tax and excise and use tax on businesses outside the city limits but within the police jurisdiction based on the state sales tax statutes.

3. Defendant Jim Folsom is named in his official capacity as Governor of the State of Alabama, and as such he is charged by law with the duty of taking care that all laws are faithfully executed; Defendant James White is named in his official capacity as Director of Finance for the State of Alabama, and as such he exercises authority over monies collected and distributed by the Department of Revenue of the State of Alabama; Defendant Robert Childree is named in his official capacity as Comptroller for the State of Alabama, and as such he exercises authority over monies distributed from the general fund of the State of Alabama. Defendant George E. Mingledorff, III, is named in his official capacity as Commissioner of the Department of Revenue, and as such he exercises authority over the collection of the sales taxes.

PLAINTIFF CLASS ACTION AVERMENTS

4. This action is brought by plaintiff as a class action, on its own behalf and on behalf of all others similarly

situated under provisions of Rule 23 of the Alabama Rules of Civil Procedure, for damages and injunctive relief.

5. The class represented by plaintiff operates businesses outside the corporate limits of cities in the State of Alabama but within the police jurisdiction of the cities and are charged a local sales tax based on the State sales tax. The sales taxes levied against members of the class was enacted by the cities pursuant to Ala. Code § 11-51-206 (1975).

6. The exact number of members of the class is not presently known, but the class is so numerous that joinder of individual members is impracticable.

7. There are common questions of law and fact in this action that relate to or affect the rights of each member of the class—each member of the class was charged the taxes pursuant to a local ordinance which was enacted pursuant to the state statute, the constitutionality of which similarly affects the rights of each member of the class—and the relief sought is common to the entire class as set out below.

8. The claims of plaintiff, which is a representative of the class described above, are typical of the claims of all members of the class.

9. The named plaintiff is the representative party for the class and is able to and will fairly and adequately protect the interests of the class.

10. Attorneys for plaintiff are experienced and capable in class action litigation and attacking the constitutionality of state laws and have successfully represented claimants in class action litigation attacking the constitutionality of state laws.

11. This action is properly maintained as a class action under Rule 23(b)(1) in that:

(a) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants;

(b) The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

12. Alternatively, this action is properly maintained as a class action under Rule 23(b)(2) in that the defendants have acted consistently in that they have acted pursuant to a state statute, and the actions of the defendants are applicable to the class as a whole, thereby making appropriate final injunctive relief with respect to the entire class as a whole;

DEFENDANT CLASS ACTION AVERMENTS

13. This action is brought by plaintiffs as a defendant class action against the City of Albertville and against all municipalities within the State of Alabama which enacted local sales tax ordinances pursuant to Ala. Code § 11-51-206 (1975), under provisions of Rule 23 of the Alabama Rules of Civil Procedure.

14. The class of defendants represented by Defendant City of Albertville are all the municipalities within the State of Alabama which enacted local sales tax ordinances pursuant to Ala. Code § 11-51-206 (1975).

15. The number of members of the defendant class is so numerous that joinder of individual members is impracticable.

16. There are common questions of law and fact in this action that relate to or affect the rights of each member of the defendant class—each member of the class enacted and enforced a local sales tax ordinance which placed a sales tax on businesses outside their city limits but within their police jurisdictions based on Code § 11-51-206, the constitutionality of which similarly affects the rights of each member of the class—and the relief sought is common to the entire class as set out below.

17. The defenses of the defendant city, which is representative of the defendant class described above, are typical of all members of the class.

18. The representative defendants are the representative parties for the class and are able to and will fairly and adequately protect the interests of the class.

19. This action is properly maintained against a defendant class under Rule 23(b)(1) in that:

(a) the prosecution of separate actions against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants;

(b) The prosecution of separate actions against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

20. Alternatively, this action is properly brought against a defendant class under Rule 23(b)(3) in that questions of law or fact common to the members of the class predominate over any questions affecting only indi-

vidual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

ALLEGATIONS OF FACT

21. Ala. Code § 40-23-2 (1975) sets forth a tax levied on gross receipts tax (sales tax) for the State of Alabama. This tax is a revenue generating tax and not regulatory.

22. Ala. Code § 11-51-200 (1975), authorizes municipalities to provide for the levy of sales taxes, parallel to the levy of state sales taxes established by §§ 40-23-1, 40-23-2, 40-23-4, 40-23-6 through 40-23-32.

23. Ala. Code § 11-51-201 (1975), makes all such taxes levied by the municipalities subject to all definitions, exemptions penalties, fines, deductions, etc. provided in the state statutes pertaining to sales taxes.

24. Ala. Code § 11-51-206 (1975), gives the municipalities the power to levy this sales tax within their respective police jurisdictions, provided said levy does not exceed 1/2 of the amount levied on businesses within the City.

25. Ala. Code § 11-51-207 1975 allows municipalities to pass an ordinance requiring the State Department of Revenue to administer and collect the tax levied. The administration and collection by the state must be in accordance with sections §§ 11-51-180 through 11-51-185.

26. A certified copy of the ordinance is filed with the State Department of Revenue. The Department of Revenue then collects the tax, deducts a cost for collection, and pays the balance to the municipalities at the first of each month.

27. Ala. Code § 11-51-206, which authorizes municipalities to levy sales, use and excise taxes in police jurisdictions is unconstitutional because the tax is a revenue generating tax and therefore constitutes taxation without

representation and the taking of property without due process of law.

28. Defendant Albertville passed an ordinance pursuant to Ala. Code § 11-51-206 which levies sales, use and excise taxes in its police jurisdiction. Defendant Albertville further passed an ordinance pursuant to Ala. Code § 11-51-207 (1975) authorizing the State Department of Revenue to collect the tax.

29. Plaintiff moved from within the city limits of Defendant Albertville to within the police jurisdiction of the Defendant Albertville. After the move, the taxes Plaintiff was to pay became confused and the State Department of Revenue entered a final assessment for sales taxes not paid by the Plaintiff.

30. The local ordinance passed by Defendant Albertville is unconstitutional because the tax is a revenue generating tax and therefore constitutes taxation without representation and the taking of property without due process of law.

31. The collection of the tax by the State Department of Revenue and the retention of some of the funds collected — which are paid into the general fund — is unlawful because the tax is unconstitutional.

RELIEF SOUGHT

32. Based upon the foregoing allegations and averments, plaintiffs pray for the following relief by appropriate orders from this Honorable Court:

(a) an order pursuant to A.R.C.P. Rule 23(c)(1) certifying this action as a class action, with a plaintiff and defendant class, with further orders as deemed necessary and proper by the Court under the premises as the Court deems necessary and proper;

(b) a judgment declaring §§ 11-51-206 *Code of Alabama,* (1975) to be unconstitutional;

(c) an order refunding all taxes collected from plaintiff and members of the class by the Alabama Department of Revenue, Defendant Albertville and individual members of the Defendant class;

(d) an order declaring the final assessment against Plaintiff to be null and void;

(e) a permanent injunction prohibiting the Department of Revenue and members of the Defendant class from collecting the tax against businesses within the police jurisdictions.

(f) an award of attorneys fees pursuant to equitable common fund principles to attorneys for plaintiff and the class certified by the Court; and

(g) an award of such other, further and different relief as the class may be entitled.

NOTICE TO ATTORNEY GENERAL

Plaintiffs hereby certify they have sent a copy of this complaint, seeking to declare unconstitutional a statute of the State of Alabama to Honorable James Evans, Attorney General for the State of Alabama, by certified mail on the date the original complaint was filed.

/s/ William J. Baxley
WILLIAM J. BAXLEY

/s/ Charles A. Dauphin
CHARLES A. DAUPHIN
Baxley, Dillard & Dauphin
Attorneys for Plaintiffs
2000 16th Avenue South
Birmingham, Alabama 35205
(205) 939-0995

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 3rd day of November, 1993 served a copy of the foregoing pleading on all counsel of record in this cause by placing same in the U.S. Mail, postage prepaid and properly addressed to:

Jerry Carpenter, Esq.
State of Alabama
Department of Finance, Legal Div.
Room 205, Alabama State House
Montgomery, AL 36130

Dan Schmaeling, Esq.
Department of Revenue and Assistant
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§ 11-51-91. Establishment and collection of license for conduct of business, trade or profession outside corporate limits of municipality.

Any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, that the amount of such licenses shall not be more than one half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded; and provided further, that the total amount of such licenses shall not be in an amount greater than the cost of services provided by the city or town within the police jurisdiction; and provided further, no calculation is required to be made by the municipal officials for the cost of services to any particular business or classification of businesses within the police jurisdiction so long as the total amount of such licenses collected in the police jurisdiction shall not be in an amount greater than the cost of services provided by the city or town to the police jurisdiction; provided further, that when the place at which any such business, trade or profession is done or carried on is within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this section, such licenses shall be paid to and collected by that municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession; and provided further, that this section shall not have the effect of repealing or modifying the limitations in this division relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities and insurance companies and their agents. This section shall be given a liberal construction to effectuate its purpose and meaning. (Acts 1927, No. 580, p. 674; Acts 1932, Ex.

Sess., No. 235, p. 240; Code 1940, T. 37, § 733; Acts 1943, No. 502, p. 477; Acts 1986, No. 86-427, p. 790.)

Supreme Court, U.S.
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No. 99-009

IN THE

SUPREME COURT OF THE UNITED STATES

OLIVER & WRIGHT MOTORS, INC., etc.,

Petitioners,

v.

CITY OF HOOVER and
CITY OF ALBERTVILLE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT, CITY OF HOOVER, IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent objects to the question presented for review in Petitioners' Writ for Certiorari because it misstates the issue decided by the Supreme Court of Alabama. Rather, based on the decision of the Supreme Court of Alabama, the following question is presented for review:

> **WHETHER MUNICIPALITIES CAN CONSTITUTIONALLY EXERCISE THE POWER DELEGATED TO THEM BY THE ALABAMA STATE LEGISLATURE CONTAINED IN [§11-51-206, ALA. CODE 1975], WHICH ALLOWS THEM TO IMPOSE SALES TAXES ON RETAIL CONSUMERS FOR PURCHASES FROM BUSINESSES LOCATED OUTSIDE THE CORPORATE LIMITS BUT WITHIN THEIR RESPECTIVE POLICE JURISDICTIONS?**

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TABLE OF AUTHORITIES

Cases:

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978) 2

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) 2

Other Authorities:

28 U.S.C. §1254 1

28 U.S.C. §1257 1

Rule 10, U.S. Supreme Court 1

STATEMENT OF BASIS FOR JURISDICTION

Petitioners have improperly invoked this Court's jurisdiction. Petitioners correctly state that the Petition for Writ of Certiorari is from a decision of the Supreme Court of Alabama in a civil case. Accordingly, 28 U.S.C. §1257 (relating to this Court's review of final judgments or decrees rendered by the highest court of a State in which a decision may be had) is the appropriate basis of this Court's jurisdiction of the question presented in this case. Petitioners' statement that the basis for this Court's jurisdiction derives from 28 U.S.C. §1254 (relating to this Court's review of cases in the courts of appeals) is erroneous.

ARGUMENT

I.

PETITIONERS FAIL TO DEMONSTRATE A COMPELLING REASON WHY THIS COURT'S REVIEW OF THE QUESTION PRESENTED IS APPROPRIATE.

Supreme Court Rule 10 indicates the character of the reasons this Court considers in exercising its discretion to grant a petition for writ of certiorari. While apparently relying on Supreme Court Rule 10(c) in support of the Petition for Writ of Certiorari, Petitioners raise no important federal question that has not been settled by this Court, nor one that is in conflict with the relevant decisions of this Court. Instead, Petitioners misstate the federal question decided by the Supreme Court of Alabama in this case to avoid the relevant decisions of this Court that actually support the decision of the Supreme Court of Alabama on the question presented for review.

II.

THE SUPREME COURT OF ALABAMA PROPERLY DECIDED THE FEDERAL QUESTION PRESENTED IN THIS CASE.

Petitioners acknowledge in the Petition for Writ of Certiorari that this Court has held that police jurisdiction residents are not entitled to participate in the municipal franchise. *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 151 (1978). In the absence of a constitutional right to vote in municipal elections, Petitioners have no grounds for requesting that this Court overturn the Supreme Court of Alabama's rationale basis review of the challenged scheme of taxation. Petitioners' claim that Petitioners are aware of no prior cases allowing a governmental entity to tax activities outside of its borders for the purpose of raising general revenues ignores the decisions of this Court allowing States considerable latitude in establishing their internal fiscal policies. *See, e.g., Commonwealth Edison Company v. Montana,* 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981).

Finally, Petitioners attempt to persuade this Court to apply an interstate commerce analysis to the challenged statute by generically characterizing Respondent as a governmental entity taxing activities outside of its borders. This case does not trigger an interstate commerce analysis, however, because the challenged statute authorizes a political subdivision of the State of Alabama to impose a general revenue tax on transactions occurring within the State of Alabama's borders. Petitioners may disagree with the State of Alabama's chosen method of taxation in this case, however, Petitioners' arguments should be addressed to the Alabama State Legislature rather than to this Court.

CONCLUSION

Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,

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